Office-Supreme Court, U.S.
FILED
JUL 24 1961
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term 1961

No. 273

LEE HENSLEE, SUPERINTENDENT OF THE ARKANSAS STATE PENITENTIARY ..... *Petitioner*

v.

LUTHER BAILEY ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Attorney General of the State of Arkansas, on behalf of Lee Henslee, Superintendent of the Arkansas State Penitentiary prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, reversing the conviction of respondent for rape.

OPINION BELOW

The opinion of the District Court is reported in 184 F. Supp. 298. The opinion of the Court of Appeals (Appendices, *infra*, pp. 1-20) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1961 (Appendices, *infra*, p. 21). A petition

for rehearing was filed April 25, 1961, and was denied by the Court of Appeals on May 4, 1961 (Appendices, *infra*, p. 22). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether there was discrimination in the selection of the jury panel which tried and convicted respondent.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT

In September of 1956, respondent was tried and convicted in the First Division of the Pulaski County Circuit Court [1] on a one count information charging rape. Since his conviction the case has been in the appellate courts several times. For a history of the appeals see footnote 3 of the opinion of the Court of Appeals (Appendices, *infra*, p. 2).

Pursuant to a suggestion by this Court in denying a petition for writ of certiorari in *Bailey* v. *Henslee*, 361 U.S. 945, the respondent petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus. He based his petition on the question whether members of the Negro race were deliberately and intentionally limited and excluded in the selection of petit jury panels.

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[1] The Circuit Court of Pulaski County is divided into three divisions. The First Division, in which respondent was tried, tries only criminal cases. The Second and Third Divisions handle the civil docket exclusively.

On April 1, and April 12, 1960, testimony was taken in the District Court on an order to show cause why a writ of habeas corpus should not be issued. After hearing the evidence the District Court found that there was no discrimination in the selection of the panel of the 1956 March term which tried respondent, and that a *prima facie* case of discrimination was not made by a comparison of jury panels through a number of prior years. On appeal, the judgment was reversed.

THE EVIDENCE

At the hearing in the District Court it was stipulated by respective counsel that no negro had served on a petit jury panel in the Second and Third Divisions of the Pulaski County Circuit Court since 1939.

The District Court also considered the evidence adduced at respondent's trial which reflected the record of poll tax receipts issued in Pulaski County for the years 1954 and 1955. These records showed that the total number of colored poll tax holders (1954) 10,180 14.8% (1955) 8,557 13.3%. Total number of white (1954) 58,484 85.2% (1955) 55,980 86.7% (R.24). The testimony and the records reflect that the jury panels were constituted as follows:

TERM OF COURT	TOTAL NO. JURORS			TOTAL NO. NEGROES		
	REG.	ALT.	SPECIAL	REG.	ALT.	SPECIAL
March 1952	24	12	Not Shown	2	0	Not Shown
Sept. 1952	24	12	Not Shown	1	0	Not Shown
March 1953	24	12	Not Shown	2	0	Not Shown
Sept. 1953	24	12	50	2	0	3
March 1954	24	12	24	2	0	Not Shown
Sept. 1954	24	12	100	2	1	Not Shown
March 1955	24	12	100	3	0	4
Sept. 1955	24	12	100	3	0	Not Shown
March 1956	24	12	450	3	0	Not Shown [2]

[2] A total of five special panels, with approximately 450 names, were selected. It is uncertain how many were actually called. Race could not be determined.

The above information has to be qualified to the extent that there was no way of knowing whether the special panels contained any negroes for the reason that the testimony revealed that race could not be determined until the particular juror reported for duty.[3]

The jury commissioners for the March, 1956, term, in the First Division of the Pulaski County Circuit Court testified that they selected jurors for the regular and alternate panel whom they thought to be qualified, without consideration of race. They further testified that they had a wide acquaintance with both white and colored citizens of Pulaski County but did not select negroes with the intention of having any particular number and did select three negroes for the regular panel.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the facts, taken in the aggregate, lead to a conclusion of a *prima facie* case of limitation of members of the negro race in the selection of the respondent's petit jury panel was established.

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[3] At. R. 110 Mr. Louis Rosteck, former deputy circuit clerk, testified as follows:

"Q. . . . Mr. Rosteck, is there any way that you can tell, from examining the list of the special panel of petit jurors in this March, 1956 term, whether they are white or colored?"

"A. No, sir, that is impossible to do unless I would be personally acquainted with some of them. The special panel No. 1 lists the name, address, and I believe, telephone numbers of some of them. The special panel No. 2 lists part of the names, address and telephone number, but on the remainder, all that is listed is the name and the telephone number and I have no way of determining whether these jurors are white or whether they are colored."

REASONS FOR GRANTING THE WRIT

I

The only apparent reason indicated by the reversal of the District Court by the Court of Appeals is the language contained by this Court in its denial of certiorari in *Bailey* v. *Henslee, supra,* where it was said:

> ". . . without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of the petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

The decision of the court below is directly in conflict with the decisions of this Court. Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. *Patton* v. *Mississippi*, 332 U. S. 463. No case ever decided by this Court has reached the extreme decision of the Court of Appeals in the case at bar. The case of *Smith* v. *Texas*, 311 U. S. 128, is the closest in point. There the evidence showed that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none. The testimony of the jury commissioners "admitted that they did not select any negroes, although the subject was discussed, but they denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such. One said that their failure to select negroes was because they did not know the names of any who were qualified, and the other said that he was not personally acquainted with any member of the negro race." However, this Court made clear the basis of its decision in the following language:

> Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

The basis of the above decision is far removed from the decision of the court below. This Court has never reversed a conviction on the sole basis of systematic limitation and never has reversed a case where negroes have been on every jury panel in varying numbers such as in the case at hand.

As this Court said in *Brown* v. *Allen*, 344 U. S. 443, 471:

> While discriminations worked by consistent exclusion have been rigorously dealt with, *Neal* v. *Delaware*, 103 U. S. 370; *Carter* v. *Texas*, 177 U. S. 442; *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Hill* v. *Texas*, 316 U. S. 400; *Patton* v. *Mississippi*, 332 U. S. 463; variations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued. *Akins* v. *Texas*, 325 U. S. 398, 403. Of course, token summoning of Negroes for jury service does not comply with equal protection, *Smith* v. *Texas*, 311 U. S. 128. Nor can a race be proscribed as incompetent for service, *Hill* v. *Texas*, 316 U. S. 400.
>
> Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, Elements of the Art of Packing as Applied to Special Juries, p. 6, it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions.

Here, there has been no token summoning of negroes for jury service. As the evidence clearly shows there have been negroes on every jury panel in the First Division of the Pulaski Circuit Court, the criminal division, in varying numbers of one to seven. And, the District Court noted in *Bailey* v. *Henslee*, *supra*, at p. 302:

> In 1955, the poll tax year from which petitioner's jury was selected, Negroes constituted 13.3% of the poll tax holders in Pulaski County. Negroes constituted 8.33% of the regular and alternate jury panels initially selected, and 8.1% of the panel from which petitioner's jury was chosen. We do not believe that such evidence is sufficient to support a *prima facie* case of discrimination.

Nor can it be said that the jury commissioners acted in bad faith. In fact the evidence shows nothing but good faith efforts by the jury commissioners. Furthermore, the fact that the jury commissioners selected negroes for the panel satisfies the burden placed on the State under the holding in *Patton* v. *Mississippi*, *supra*, and the burden then devolved on respondent to show that the jury commissioners practiced "evasion". There is no such showing. The language of this Court in *Akins* v. *Texas*, 325 U. S. 398, squarely conflicts with the decision of the Court of Appeals. There it was said:

> Petitioner's sole objection to the grand jury is that the "commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member." Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives*, 100 U. S. 313, 322-23; *Thomas* v. *Texas*, 212 U. S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The

> number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection . . . Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds." *Hill* v. *Texas*, *supra*, 404. Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama*, *supra*; *Hill* v. *Texas*, *supra*; and *Smith* v. *Texas*, *supra*. The mere fact of inequality in the number selected does not in itself show discrimination.

As the above cases demonstrate, the decision of the Court of Appeals is directly in conflict with the decisions of this Court.

A further error was committed when this Court directed the District Court to hear evidence on the question whether members of respondent's race were deliberately and intentionally limited and excluded in the selection of petiti jury panels. It must be conceded that respondent could have very easily subpoenaed the jury commissioners for the March, 1956, term and placed their testimony in the original record. But this he did not do. He waited until the morning that the trial was to commence and then filed a motion to quash the jury panel. He did not subpoena the jury commissioners and did not have them available in order that they might testify. In fact he had made no effort to contact them and ascertain what their testimony might be. He then failed to make

an offer of proof as to what their testimony would have been had the trial court allowed him to subpoena them. *Bailey* v. *State*, 227 Ark. 889, 302 S.W. 2d 796. For this Court to later allow him to use evidence that he could have easily obtained at the original trial flies in the face of the previous decisions of this Court.

Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered, *Ex parte Spencer*, 228 U. S. 652, 660; *In re Wood*, 140 U. S. 278, 285; *Crowe* v. *United States*, 175 F. 2d 799; *Price* v. *Johnston*, 334 U. S. 266, 289, and the dissent.

Settlement of these questions by this Court is plainly in the interest of the administration of the criminal law since they are likely to be presented in almost every *habeas corpus* proceeding and in every case of conviction of a negro in a state court.

II

The decision below in holding that the facts, taken in the aggregate, lead to a conclusion of a *prima facie* case of limitation seems so contrary to principles enunciated by this Court that the petitioner also urges this aspect of the case as a basis for *certiorari*.

The opinion of the court below contained nine factual summations which it said lead them to the conclusion that a *prima facie* case of limitation of members of the negro race in the selection of the appellant's petit jury panel was established. These nine factual summations are discussed in order.

1. The court below said: "Since 1939 no Negro has ever served on any kind of panel, regular, alternate or special, in the Second or Third Divisions of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a *prima facie* case of discrimination in the selection of juries in these civil divisions has been established."

It is admitted that no negroes have served on the jury panels in the Second or Third Divisions of the Pulaski County Circuit Court since 1939. But these divisions are not involved in the case at bar. These divisions try only civil cases, they have their own jury commissioners and their own petit jury panels. This particular point has caused grave concern in the civil divisions and also in the criminal division of the Pulaski Court. It was not clear in the decision below what weight was attached to this particular fact. Consequently, these separate courts are presently at a loss as to what is expected of them in the formation of future petit jury panels. The First Division criminal court has no control over the naming of jury commissioners for the other divisions, and is thus placed in an impossible situation. The First Division could no more quash the jury panels in the Second and Third Divisions than it could a jury panel in Cook County, Illinois. These divisions of the Pulaski Circuit Court are just as distinct as though they were in separate counties. Certainly this Court has never gone so far as to say that the formation of the jury panels in "X" County would provide any "atmosphere" of exclusion in "Y" County. Yet, this is the practical effect of the language contained in the opinion of the court below. How does the fact that there are no negroes on the civil panels prejudice the rights of a negro on trial in the criminal division with its separate jury panel? The answer is

obvious—it cannot. Until the opinion of the court below is clarified the separate divisions cannot intelligently handle the business before them.

2. & 6. Here, the court below said: "The First Division's panels of alternates, from 1952 to 1960, with one possible exception, contained no Negro name. Here again it can be said that this fact creates an unrebutted *prima facie* case of discrimination in the selection of these alternates."

It will be noted by the above language the court below took into consideration the composition of eight subsequent jury panels. These were the panels from September, 1956, through March, 1960. They should not have considered any panel beyond the term at which the respondent was tried. For as this Court said in *Brown* v. *Allen*, *supra*: "Former errors cannot invalidate future trials." *A fortiori*, subsequent errors cannot invalidate former trials.

Again, under its factual summation 6, the court below said that "There is an unexplained and seemingly unusual amount of repetition of the names of negroes which do appear on the regular panels from 1953 to 1960 . . ." The petitioner insists that the court below erred in considering any evidence beyond the March, 1956, panel which actually tried the respondent. The reason for this insistence is that any negro presently in confinement could file a petition for a writ of habeas corpus and allege that since his conviction the formation of jury panels had been done in an unconstitutional manner and based on the opinion of the court below such petition would have to be considered as having merit. Obviously, if such a decision is allowed to stand, the several States will be subjected to the possibility of a large number of applications for writs of habeas corpus.

3. The court below noted "The 5 special panels assembled for the March, 1956, term in the First Division, which contained an aggregate of approximately 450 names, included, according to the stipulated Exhibit 1, the name of no Negro." This stipulation, however, was only to the extent that the present deputy circuit clerk would testify that to his knowledge the name of no negro was contained in the 5 special panels (R.5). The reason for the stipulation was that the clerk had no way of determining whether a negro had been selected or not. In fact since some of the 5 special panel lists were never opened how could anyone testify as to whether the lists contained the names of any negroes? They could not. However, since this point was definitely cleared up by the testimony of the former deputy circuit clerk, Louis W. Rosteck, the court below erred in considering the stipulation at all. Rosteck testified that the lists opened contained the names, addresses and telephone numbers of the persons selected. There was no indication of race and he could not determine whether these jurors were white or colored (R.110). Since some of the special panels were never opened and since the jury commissioners failed to designate color it thus became impossible to prove or disprove the presence of negroes on these special panels. Hence, the court below must have resorted to speculation and conjecture to say that no negroes were on the special panels.

4. The court below said here that "Fourteen of the persons on the defendant's own petit jury panel of 37 names came from those 2 special panels consisting exclusively of white persons. Then the court below quoted from *Maxwell* v. *State*, 217 Ark. 691, 232 S.W. 2d 982, 983, saying that in a not dissimilar situation the Supreme Court of Arkansas reversed because of a commingling of an original 13 jurors with a panel containing negroes.

The Maxwell case was reversed because there had been no negroes summoned for trial jury service for more than a quarter of a century. Instead of quashing the jury panel the trial court had a special panel summoned which contained eight negroes. The court then commingled this special panel with the remaining 13 members of the illegally constituted regular jury panel. But the facts in the case at bar are readily distinguishable from the facts contained in the Maxwell case. Here there was no illegally constituted jury panel in the first isntance, thus, the Maxwell case does not apply.

5. Although the court below said "We recognize, of course, that mere lack of identity in proportions is not in itself unconstitutional," it then took such a fact into consideration. This in itself ignores the decisions of this Court. *Virginia* v. *Rives*, 100 U. S. 313, 322-3; *Akins* v. *Texas*, *supra*. Nevertheless, even taking this factor into consideration, it fails to show any exclusion or limitation. The record reflects that in 1955 negroes constituted 13.3% of the poll tax holders in Pulaski County and 8.33% of the regular and alternate jury panels initially selected and 8.1% of the panel from which appellant's jury was chosen. These facts fall far short of showing discrimination or limitation in the selection of the jury panels.

7. The court below also said "The Pulaski County poll tax receipts were given racial marks. They contained a "C" when the holders were known to be colored and a "W" when they were known to be white. Where race was unknown, as was often the case when payment of the tax was made by mail, they were marked "W".

The fact that poll tax receipts are given racial marks is not deemed a factor in this case for how else can it be ascertained how many colored and how many white poll

tax holders are in a given county. It will have to be admitted that these marks would have been a factor had the evidence adduced reflected that a discriminatory resulted been reached as in *Avery* v. *Georgia*, 345 U. S. 559. But in the Avery case this Court made cleared the reason for its decision when it said:

> The stark resulting phenomenon here was that somehow or other, despite the fact than over 5% of the slips were yellow, no negro got onto the panel of 60 jurors from which Avery's jury was selected.

In the case at bar no such result was reached. The record here shows negroes have been selected on every jury panel since 1952. Hence, the court below erred in considering the racial marks.

8. & 9. Under these summations the court below said: "The jury commissioners, except, perhaps, for two terms, themselves identified names of Negroes on the lists by the designation "(C)" or "(Col)" or "(Colored)". Why this was done does not appear. There is testimony, as is usually the situation in these cases, that this was of no persuasion so far as the jury commissioners were concerned. The testimony of the jury commissioners as to their efforts to ascertain the names of qualified Negroes leaves much to be desired."

It is true that some of the jury commissioners identified names of negroes on the jury lists. It is also true that for two terms of court this was not done. On other lists some negroes were designated and some were not (R.114). Since the testimony shows that the markings were done in such a haphazard manner their evidentiary value becomes valueless and should not have been considered.

By saying that the testimony of the jury commissioners leaves much to be desired it becomes apparent that the court below sought to bring the case at hand within the limits of *Cassell* v. *Texas*, 339 U. S. 282. The testimony of the commissioners in the case at bar is entirely different than those in the Cassell case.[4]

In the Cassell case no negroes were on the grand jury involved. In the present case there were three negroes on the petit jury that actually tried respondent. The jury commissioners in Cassell testified that they did not know any negroes they thought were qualified. Here, the jury commissioners said that they were acquainted with many negroes that were qualified and, further, whether they were personally acquainted with them or not, if their names were on the poll tax list they could call them. In the Cassell case, at p. 287, this Court left no doubt as to the basis of its decision when it said:

> Our holding that there was discrimination in selection of the grand jury in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand jury list, the commissioners said that they knew none available who qualified; at the same time they said they

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[4] Commissioner McArthur: testified as follows:

"A. I assumed that any person whose name was on that list of qualified electors could be called as jurors, regardless of color, if his name appeared there, or her name appeared there, if they were qualified to serve and by law we could summon them—and to the best of my ability, and I think I speak for the other two commissioners, our job was to find a representative well qualified jury, and if the person's name appeared there we could call them, white or colored (R.44)."

• • •

"Q. How many Negroes do you know in Pulaski County?"

"A. I really could not say. I've lived here off and on all my life, thirty-eight years, and I'd say I know as much as anyone else in this courtroom, maybe more (R.50)."

• • •

Commissioner Cavin testified:

"Q. Mr. Cavin, was there any special effort made on your part

chose jurymen only from those people with whom they were personally acquainted.

And at p. 290:

> The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes . . ., is discrimination in violation of petitioner's constitutional rights.

The evidence in the case at bar shows no such lack of knowledge.

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to acquaint yourself with Negro poll tax holders in Pulaski County?"

"A. No. I feel like I know as many colored people in Pulaski County as any other white person, probably more (R.60)."

• • •

"Q. And did you seek to insure that Negroes would have representation?"

"A. We didn't go down insofar as race, creed, or color. We selected qualified jurors that we thought could serve to the best interest of all concerned."

"Q. And you more or less ignored the fact as to whether or not Negroes would be represented?"

"A. It didn't make any difference whether colored or white (R.62)."

• • •

Commissioner Davis testified:

"Q. At the time that you were selected, about how many Negro poll tax holders did you know in Pulaski County, Arkansas?

"A. I don't know who has poll taxes. I know a great many of the Negro race, but I don't know who has a poll tax and who doesn't (R.88, 89)."

• • •

"Q. Mr. Davis, how long have you lived in Pulaski County?"

"A. Nineteen years."

"Q. Are you fairly well acquainted with both the white and colored race in Pulaski County?"

"A. I think so, a segment of them."

"Q. While in the process of selecting this petit jury, did it make any difference to you whether they were white or colored?"

"A. It didn't (R.93)."

CONCLUSION

It is apparent that the court below has made a new rule in regard to systematic limitation. It is further apparent that it erred in holding, that where there are separate civil and criminal divisions of a circuit court, exclusion of negroes in the civil division has a bearing on the criminal division. For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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June 5, 1961.